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Fifth report on diplomatic protection

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Introduction*

1. The Special Rapporteur has submitted four reports to the International Law Commission on the diplomatic protection of natural and legal persons and the exhaustion of local remedies.[1] Those reports have covered all the topics traditionally associated with these subjects and proposed 22 draft articles. The Commission has thoroughly considered the reports and given its approval to 16 of the proposed articles. Six draft articles have been discarded by the Commission on the ground that they did not properly belong to the subject of diplomatic protection or were not ripe for codification.

2. In his third report, in 2002, the Special Rapporteur addressed suggestions that the draft articles should be expanded to include a number of matters that do not traditionally fall within the field.[2] At its fifty-fourth session, in 2002, the Commission accordingly considered whether it was desirable to include in the present draft articles provisions dealing with the functional protection by international organizations of their officials; the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew, irrespective of the nationality of the individuals concerned; the delegation of the right of diplomatic protection; the protection of persons in a territory controlled, occupied or administered by another State or administered by an international organization; the denial of justice; the "clean hands" doctrine in the context of diplomatic protection; and the legal consequences of diplomatic protection.[3] The debate in the Commission revealed little support for the inclusion of those topics in the present draft articles, with the possible exception of the right of the State of nationality of a ship or aircraft to bring a claim on behalf of its crew.[4] The Commission did, however, express the view that consideration should be given to the relationship between functional protection by the United Nations and diplomatic protection by a State and the possibility of competing claims to protection.[5]

3. In the report on its fifty-fifth session of 2003, the Commission requested the Sixth Committee of the General Assembly to make comments on the diplomatic protection of the members of a ship's crew by the flag State and the diplomatic protection by States of nationals employed by an intergovernmental international organization and to express an opinion on whether there were any issues other than those already covered by the Commission which ought still to be considered by the Commission on the subject of diplomatic protection.[6] The majority of speakers on those subjects in the Sixth Committee were opposed or indifferent to the inclusion of the diplomatic protection of members of a ship's crew by the flag State and the diplomatic protection by States of nationals employed by an intergovernmental

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[1] A/CN.4/506 and Corr.1 and Add.1 (2000); A/CN.4/514 and Corr.1 (2001); A/CN.4/523 and Add.1 (2002); A/CN.4/530 and Add.1 (2003).

[2] A/CN.4/523, para. 16.

[3] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 118-149.

[4] Ibid., para. 146.

[5] Ibid., para. 145.

[6] Ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), paras. 28-29.

international organization. However, there was sufficient interest in those topics to warrant their further consideration by the Commission. Apart from two States, which expressed an interest respectively in the inclusion of provisions on the delegation of the right of diplomatic protection (Czech Republic)[7] and the protection of persons in a territory controlled or occupied by another State or administered by an international organization (Portugal),[8] there was no request for the consideration of any additional subjects by the Commission on the subject of diplomatic protection. On the contrary, many delegations expressed the view that all the subjects traditionally belonging to the field of diplomatic protection had been covered and that it was incumbent on the Commission to conclude its study of the subject as soon as possible, and certainly within the remaining three years of the current quinquennium. Similar views have also been expressed by members of the Commission.

4. The present report will first address the issues of the protection of persons in a territory controlled or occupied by a State or administered by an international intergovernmental organization and the delegation or transfer of the right of diplomatic protection, which the Special Rapporteur believes should not be included in the present draft articles. The report will then make proposals dealing with the subject of competing claims to protection of an individual by an international organization and a State, and the protection of a ship's crew by the flag State.

A. Protection by an administering State or international organization

5. The Commission carefully considered the question whether the present draft articles should include the protection of persons of a territory administered, controlled or occupied by another State or international organization at its fifty-fourth session, in 2002.[9] There was no support for the inclusion of such a right in the context of military occupation as this falls within the purview of international humanitarian law, and particularly the Fourth Geneva Convention on the protection of civilians of 1949 and Additional Protocol II to that Convention of 1977.[10] Although there was some support in the Commission for the consideration of the protection by an international organization of persons living in a territory which it administered or controlled, the majority of the Commission took the view that the topic was one that "might be better addressed in the context of the responsibility of international organizations".[11]

6. The diplomatic protection of persons resident in a territory under the protection of a State that does not exercise sovereignty over that territory is not without precedent in international law. Persons living in "protectorates",[12]

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[7] A/C.6/58/SR.17, para. 48.

[8] A/C.6/58/SR.18, para. 3.

[9] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 133-136.

[10] There is authority for the view that a belligerent occupant does not have the obligation to afford diplomatic protection to the nationals of an occupied territory: *Compensation (Germany) Case* (1959) 28 *ILR*, p. 648; *Slovak National Internment Case* (1970) 70 *ILR*, p. 691.

[11] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 148.

[12] R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, vol. 1, 9th ed. (1992), pp. 266-274 (especially at p. 270).

mandates[13] or trust territories[14] have on occasion been given diplomatic protection by the administering Power, but this practice is limited,[15] dependent on the treaty or institutional relationship between the administering State and the administered State and, in any event, rests on the consent of the State against which such protection is to be exercised.[16] There is possibly precedent for the protection of persons resident in a territory administered by an international organization or agency — or claimed to be so administered[17] — but, again, the nature and scope of this protection will depend on the institutional arrangement between the administered territory, the administering Power and third States. There is thus no evidence, or too little evidence, of a general practice sufficient to warrant codification or progressive development. In any event, we are here confronted with a form of functional protection,[18] of the kind recognized in the *Reparation for Injuries*[19] case, which the Commission has decided does not belong to the present study on diplomatic protection.

B. Delegation of the right of diplomatic protection and the transfer of claims

7. There is a clear distinction between the delegation of the right of diplomatic protection and the transfer of claims. In the former case one State (or group of States) delegates its right to exercise diplomatic protection on behalf of a national to another State. In the latter case, on the other hand, the injured person transfers his claim arising from the injury to another person, who may or may not be a national of the same State.

8. A State may delegate by means of an international agreement the right to protect its nationals abroad to another State.[20] Such an agreement may be entered into when a State has no diplomatic representation in a foreign country where many of its nationals reside;[21] or when a State falls under the "protectorate" of another State;[22] or, following the outbreak of hostilities, when a belligerent will usually

[13] Ibid., pp. 298-300.

[14] Ibid., pp. 316-318.

[15] *National Bank of Egypt v. Austro-Hungarian Bank* (1923-1924), 2 *Annual Digest and Reports of Public International Law Cases*, No. 10; *Falla-Nataf v. Germany* 4 (1927-1928), ibid., No. 24; *Parounak and Bedros Parounakion v. Turkish Government* (1929-1930) 5, ibid., No. 11; G. Schwarzenberger, *International Law*, vol. 1 (International Courts), 3rd ed. (1957), pp. 378-381.

[16] Schwarzenberger, op. cit., pp. 278-381, 592-595.

[17] The United Nations Council for Namibia, established by the General Assembly in 1967 in its resolution 2248 (S-V) of 19 May 1967, issued travel and identity documents to Namibians, while South Africa remained in occupation of Namibia. (See J. F. Engers, "The United Nations Travel and Identity Document for Namibians", (1971) 65 *A.J.I.L.* 571.) No doubt the Council believed that the issuance of such a document carried with it some right of protection. The writer is not, however, aware of any case in which such protection was provided. See also P. Daillier and A. Pellet (eds.), *Nguyen Quoc Dinh, Droit international public*, 7th ed. (2002), p. 613 (para. 394).

[18] Schwarzenberger, supra note 15, p. 593.

[19] 1949 *I. C. J. Reports*, p. 174.

[20] *Oppenheim's International Law*, supra note 12, p. 936.

[21] Oppenheim cites the case of the protection of nationals of Western Samoa in terms of a 1962 Treaty of Friendship: ibid., footnote 2.

[22] See footnotes 12 and 15 above.

hand over to a neutral State the protection of its nationals in an enemy State.[23] The best known example of such a delegation of the right of diplomatic protection today is to be found in article 8 C of the Treaty on European Union (Maastricht Treaty), which provides:

> "Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection."[24]

It is not clear whether this provision, or indeed other arrangements of this kind, contemplates diplomatic protection as this term is understood in the present draft articles, that is, action taken by a State in its own right arising from an injury to a national caused by the internationally wrongful act of another State[25] — or only consular action, that is, immediate assistance to a national in distress.[26] In any event, it is difficult to suggest that a third State which has not consented to the exercise of diplomatic protection by a European State of which the injured person is not a national could be bound in law to recognize the right of such a State to protect a non-national. It is, after all, the bond of nationality between protecting State and individual upon which diplomatic protection is founded.[27] The necessity for the consent of non-European States to the scheme proposed in article 8 C is made clear in the article itself as it requires international negotiations "to secure such protection".[28] This is in line with the 1961 Vienna Convention on Diplomatic Relations, which provides that if diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled, "the sending State may entrust the protection of ... its nationals to a third State *acceptable to the receiving State*".[29] (emphasis added)

9. There are no general rules on the subject of delegated diplomatic protection. Everything depends on the nature of the treaty or institutional relationship between the delegating State, the delegated State and the third State against which the claim for diplomatic protections is brought. This factor, coupled with the limited State practice on the subject, confirms that it is not a topic ripe for codification.

10. The transfer of a claim to diplomatic protection from one person to another may arise in different situations, of which succession on death, assignment and subrogation in the case of insurance are probably the most common. In such cases the rule of continuous nationality, contained in article 4 of the draft articles,

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[23] See I. Detter de Lupis, *The Law of War* (1987), p. 322.

[24] Located in article 20 of the Consolidated Version of the Treaty Establishing the European Community. See generally on this provision, Torsten Stein, "Interim Report on Diplomatic Protection under the European Union Treaty", *International Law Association, Report of the Seventieth Conference* (New Delhi, 2002), p. 277.

[25] Article 1 of the draft articles adopted by the Commission, see supra note 3, para. 280.

[26] Stein, supra note 24, particularly pp. 278, 289.

[27] See article 2 of the draft articles adopted by the Commission, supra note 3, para. 280; *Panevezys-Saldutiskis Case*, *P.C.I.J. Reports*, Series A/B, No. 76, p. 16.

[28] See Stein, supra note 24, pp. 280-281, 284, 287. See also E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1919), p. 472.

[29] United Nations, *Treaty Series*, vol. 500, p. 95, article 45 (c); see also article 46.

applies.[30] This means that as long as the claim continuously belongs to a national of the claimant State from the time of the injury until the presentation of the claim, a change in ownership of the claim will not affect the right of the claimant State to exercise diplomatic protection. As a consequence a claim would be *denied*:

(a) If the claim had been transferred from a national to a non-national of the claimant State during the critical period,[31] i.e. if the claim had been "denationalized";

(b) If the claim had only been transferred from a non-national to a national of the claimant State after the time of the injury,[32] i.e. if the claim had been "nationalized".

11. There is ample authority for the proposition that if the person on whose behalf a diplomatic claim was made dies, the claim can only rightfully be pursued further if the heir or legatee is of the same nationality as the decedent.[33] The same principle applies to the assignment of claims.[34] According to Brownlie:

> "If during the critical period a claim is assigned to or by a non-national of the claimant State, the claim must be denied. However, assignment does not affect the claim if the principle of continuity is observed."[35]

12. Subrogation is the legal mechanism allowing the insurer to assume the rights of the insured and make a legal claim for the wrong inflicted. Once the insurer has paid the insured, it steps into the shoes of the person originally injured. The insured can no longer claim damages on his own behalf insofar as he has been compensated by the insurer.[36] In insurance subrogation situations, the principle of continuous nationality is only observed when both the insured and the insurer are nationals of the claimant State.[37] The claimant State cannot intervene on behalf of foreign

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[30] *Oppenheim's International Law*, supra note 12, p. 514; I. Brownlie, *Principles of Public International Law*, 6th ed. (2003), pp. 461-463; D. P. O'Connell, *International Law*, 2nd ed. (1970), vol. 2, pp. 1049-1051. See also the resolution of the Institute of International Law at its 1965 session in Warsaw: *Annuaire de l'Institut de Droit International* 1965, vol. 2, p. 210. Article 2 of the resolution on "The National Character of an International Claim Presented by a State for Injury Suffered by an Individual" reads: "When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seized of it unless it possessed the national character of the claimant State, both at the date of injury and at the date of its presentation."

[31] Borchard, supra note 28, p. 637.

[32] *Dobozy* Claim (1958) 26 *ILR*, p. 345.

[33] *Stevenson Claim* (1903), 9 *UNRIAA*, p. 385; *Gleadell Claim* (1929), 5 *UNRIAA*, p. 44; *Flack Claim* (1929), ibid., p. 61; *Eschauzier Claim* (1931), ibid., p. 207; *Kren Claim* (1953), 20 *ILR*, p. 233; *Perle Claim* (1954), 21 *ILR*, p. 161; *Bogovic Claim* (1954), ibid., p. 156; *Hanover Bank Claim* (1958), 26 *ILR*, p. 334; *Friede Claim* (1958-II), ibid., p. 352; *Ruchwarger Claim* (1959), 30 *ILR*, p. 215.

[34] *Perle Claim* (1954), 21 *ILR*, p. 161; *Dobozy Claim* (1958-II), 26 *ILR*, p. 345; *First National City Bank Claim*, ibid., p. 323; *Batavian National Bank Claim*, ibid., p. 346.

[35] Supra note 30, p. 462.

[36] M. Whiteman, *Damages in International Law* (1943), p. 1320.

[37] *The Home Insurance Company (U.S.A.) v. United Mexican States*, 4 *UNRIAA*, p. 48. There is, however, authority for the view that the insurer should bear the risks in the contemplation of the policy and therefore not qualify for protection: *Eagle Star and British Dominions Insurance Co. Ltd. and Excess Insurance Co. Ltd. (GB v. Mexico)* (1931), 5 *UNRIAA*, pp. 139, 142.

insurers even if the insured had been its national.[38] Conversely, a State may not claim on behalf of a national insurance company that has insured foreign property because the claim did not belong to a national at the time of the injury. Although there are a few cases in which the claims of insurers of foreign property have been allowed,[39] it would seem that this was done on the basis of equity. In any event, these cases do not provide sufficient evidence of a derogation from the continuous nationality rule to constitute an exceptional rule.

13. As the transfer of claims is regulated by the continuous nationality rule, there is no need to consider further codification of this subject.

C. Protection by an international organization and diplomatic protection

1. Introduction

14. The relationship between protection by an intergovernmental organization of an agent of that organization (sometimes described as functional protection) and diplomatic protection has been raised on several occasions in debates in the Commission on the subject of diplomatic protection. The question that must now be addressed is whether — and, if so, to what extent and how — this relationship should be addressed in the draft articles on diplomatic protection. Several articles are proposed below for the consideration of the Commission which seek to cover all the issues arising from this relationship. It may well be that saving clauses of the kind proposed in articles 23 and 24 are unnecessary. On the other hand, a provision such as article 25 is probably necessary in order to take cognizance of the relationship between protection by an international organization and diplomatic protection.

Part Four
Protection by an international organization and diplomatic protection

Article 23

These articles are without prejudice to the right of an international organization to exercise protection in respect of an agent injured by the internationally wrongful act of a State.

Article 24

These articles are without prejudice to the right of a State to exercise diplomatic protection against an international organization.

Article 25

These articles are without prejudice to the right of a State to exercise diplomatic protection in respect of a national who is also an agent of an international organization [where that organization is

[38] O'Connell, supra note 30, p. 1051; G. H. Hackworth, *Digest of International Law* (1942), vol. 5, p. 810.

[39] See the cases involving the ships *Caldera*, *Circassian* and *Mechanic* described in M. Whiteman, *Damages in International Law* (1943), pp. 1320-1328.

unable or unwilling to exercise functional protection in respect of such a person].

2. Article 23

These articles are without prejudice to the right of an international organization to exercise protection in respect of an agent injured by the internationally wrongful act of a State.

15. In the *Reparation for Injuries*[40] advisory opinion of 1949, the International Court of Justice held that the United Nations was "an international person", which meant "that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".[41] The Court reasoned that:

> "In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that — whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent — he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.
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> "Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter."[42]

The Court concluded by holding

> "That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto Government with a view to obtaining the reparation due in respect of the damage caused to the United Nations [and] ... to the victim or to persons entitled through him."[43]

16. The opinion of the Court was approved by the General Assembly in its resolution 365 (IV) of 1 December 1949 and has been followed, albeit by necessary

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[40] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, 1949 *I. C. J. Reports*, p. 174.

[41] Ibid., p. 179.

[42] Ibid., pp. 183-184.

[43] Ibid., p. 187.

implication only, by the Court in other advisory opinions[44] and by the Administrative Tribunal of the International Labour Organization (ILO) in *Jurado v. ILO* (No. 1).[45] The practice of the United Nations in asserting claims in respect of its agents wrongfully injured by States further testifies to the acceptance of the Court's opinion.[46]

17. Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is a mechanism designed to secure reparation for injury to the national of a State premised on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is a method for promoting the efficient functioning of an international organization by ensuring respect for its agents. Differences of this kind have prompted both the Commission[47] and the Sixth Committee[48] to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. There are many unanswered questions relating to functional protection, of which the following are perhaps the most important: Which agents of an international organization qualify for protection?[49] To which international organizations does it apply? To the United Nations only or to all intergovernmental organizations?[50] Does it apply only to

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[44] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, 1989 *I. C. J. Reports*, p. 178, at pp. 195-196; *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, 1999 *I. C. J. Reports*, p. 62, especially at paras. 50-51, 63-64.

[45] (1970) 40 *ILR*, pp. 296, 301.

[46] See the Secretary-General's report on reparation for injuries incurred in the service of the United Nations: A/1347 (1950), A/1851 (1951), A/2180 (1952); see also annual report of the Secretary-General on the work of the Organization: A/1287 (1950), pp. 124-125; A/1844 (1951), pp. 188-189; A/2141 (1952), pp. 160-161; A/2404 (1953), pp. 144-145; A/2663 (1954), pp. 101-102; A/2911 (1955), p. 109; "The practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat", *Yearbook of the International Law Commission, 1967* (Part Two), pp. 218-219; F. Seyersted, "United Nations Forces: Some Legal Problems" (1961) 27 *BYIL* 351, at pp. 424-426; D. W. Bowett, *United Nations Forces* (1964), p. 243; annual reports of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East: 1 July 1955-30 June 1956, A/3212, annex G, para. 17; 1 July 1956-30 June 1957, A/3686, annex H, para. 8; 1 July 1957-30 June 1958, A/3931, annex H, para. 5; 1 July 1958-30 June 1959, A/4213, annex H, para. 7; I. Brownlie, supra note 30, pp. 654-655; "Financing of the United Nations peacekeeping forces in the Middle East: United Nations Interim Force in Lebanon", A/51/725/Add.1, 11 June 1997, para. 8; General Assembly resolution 51/233, 25 June 1997, para. 8; see also the following General Assembly resolutions urging Israel to comply: 52/337 (1998); 53/227 (1999); 54/267 (2000); 55/180 A (2000); 55/180 B (2001); 56/214 A (2001); 56/214 B (2002); 57/325 (2003).

[47] Supra note 3, paras. 122, 145.

[48] Speakers in the Sixth Committee debate on the Commission's report in both 2002 and 2003 have made this clear.

[49] See the separate opinion of Judge Azevedo in *Reparation for Injuries*, supra note 40, at pp. 193-195; and M. J. L. Hardy, "Claims by International Organizations in respect of Injuries to their Agents", (1962) 37 *BYIL* 516, at pp. 522-523.

[50] Brownlie, supra note 30, pp. 654-655. See also the dissenting opinions of Judges Hackworth and Badawi Pasha in *Reparation for Injuries*, supra note 40, at pp. 200 and 210 respectively; P. Pescatore, "Les relations extérieures des Communautés européennes: contribution à la doctrine de la personnalité des organisations internationales" (1961 II) 103 *Recueil des Cours* 9, at pp. 218-219; H. G. Schermers and N. M. Blokker, *International Institutional Law*, 3rd ed. (2003), p. 1184 (para. 1857).

injuries incurred in the course of official duties?[51] Is there an obligation on an international organization to protect its agents?[52] Must the injured agent first exhaust local remedies?[53] May functional protection be exercised against the State of nationality of the injured agent?[54]

18. Protection of an agent by an international organization is inherently different from diplomatic protection. Moreover, there are so many uncertainties relating to this form of protection that it is difficult to discern any clear customary rules on the subject. In these circumstances it seems best to exclude the subject from the present study and to make this clear in a saving clause along the lines of article 23. The Commission may wish to express an opinion as to whether functional protection belongs in the study on the responsibility of international organizations. In many respects the subject enjoys the same relationship to the responsibility of international organizations as diplomatic protection enjoys to the responsibility of States. This would seem to indicate that there may be a case for a separate study on this topic.

3. Article 24

These articles are without prejudice to the right of a State to exercise diplomatic protection against an international organization.

19. The question whether a State may exercise diplomatic protection against an international organization on behalf of a national was not addressed by the International Court of Justice in *Reparation for Injuries*, although it was of concern to individual judges.[55] In 1962, Jean Pierre Ritter wrote that this was one of the least explored areas of international law.[56] Forty years later, Karel Wellens commented that Ritter's observation "is still valid today as State practice is rare and case law has not yet explicitly addressed the point of such an exercise being practicable".[57]

20. Clearly this is a subject related to diplomatic protection. The rules governing nationality will apply, although it may be necessary to make some modification to the rules on dual nationality where a person is a national of the claimant State and an agent of the defendant international organization. Whether the rules relating to exhaustion of local remedies will apply is not so certain, as is evidenced by the different views on this subject advanced by scholars.[58] Despite the closeness of this

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[51] Hardy, supra note 49, pp. 521, 523.

[52] *Jurado v. ILO*, supra note 45, p. 301; Pescatore, supra note 50, p. 218; M. Akehurst, *The Law Governing Employment in International Organizations* (1967), pp. 99-100.

[53] A. A. Cançado Trindade, "Exhaustion of Local Remedies and the Law of International Organizations", (1979) 57 *Revue de droit internationale de sciences diplomatiques et politiques*, 81 at pp. 82-83; C. Eagleton, "International Organization and the Law of Responsibility", (1980 II) 76 *Recueil des Cours* 319, at pp. 351-352; Hardy, supra note 49, at p. 526; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (1996), pp. 440-441; C. F. Amerasinghe, *Local Remedies in International Law* (1990), pp. 372-373.

[54] The International Court answered this question in the affirmative in *Reparation for Injuries*, supra note 40, at p. 186. Sed contra, see the dissenting opinion of Judge Krylov, ibid., p. 218.

[55] See, for example, the dissenting opinion of Judge Krylov: 1949 *I. C. J. Reports*, p. 219.

[56] "La Protection diplomatique à l'égard d'une organization internationale", (1962) 8 *Annuaire français de droit international*, 427, at pp. 454-455.

[57] *Remedies against International Organizations* (2002), p. 74.

[58] C. Eagleton, "International Organization and the Law of Responsibility", (1950 I) 76 *Recueil*

subject to diplomatic protection, it seems that it is one that belongs to the Commission's study on the responsibility of international organizations as it will largely be concerned with issues of attribution, responsibility and reparation. Moreover, the present draft articles are mainly concerned with diplomatic protection from the perspective of the claimant State — that is, the circumstances in which claims may be brought — and not from that of the defendant State. Inevitably a study of diplomatic protection against an international organization would focus attention on the question whether — and, if so, how — such protection might be exercised against a non-State entity with a legal personality defined by its own constitution rather than customary international law. In these circumstances it is suggested that this matter be considered in the study on the responsibility of international organizations. Whether it requires mention in a saving clause of the kind suggested in article 24 is highly doubtful.

4. Article 25

These articles are without prejudice to the right of a State to exercise diplomatic protection in respect of a national who is also an agent of an international organization [where that organization is unable or unwilling to exercise functional protection in respect of such a person].

21. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization is clearly one that belongs to the present study. This is apparent from debates in both the Commission[59] and the Sixth Committee.[60]

22. The concern of States for the right of diplomatic protection if the United Nations was permitted to bring claims on behalf of their nationals as agents of the Organization[61] was reflected in the question addressed to the Court in the *Reparation for Injuries* advisory opinion. The General Assembly requested the Court, if it decided that the United Nations might bring a claim against a State with a view to obtaining reparation due in respect of damage caused to an agent, to advise

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des Cours, pp. 411-412; Wellens, supra note 57, at pp. 76-78; Cançado Trindade, supra note 53, pp. 83-85; Amerasinghe, *Local Remedies* ..., supra note 53, pp. 373-377; H. G. Schermers and N. M. Blokker, *International Institutional Law*, 3rd ed. (2003), pp. 1184-1185 (para. 1858); L. Gramlich, "Diplomatic Protection against Acts of Intergovernmental Organs" (1984), 27 *German YBIL* 386, at p. 398; Ritter, supra note 56.

[59] Supra note 3, at para. 123.

[60] In both the 2002 and 2003 debates in the Sixth Committee on the report of the International Law Commission, support was expressed for the consideration of this topic. See in particular the interventions of Morocco (A/C.6/57/SR.21, para. 20), the Islamic Republic of Iran (ibid., para. 28), Portugal (A/C.6/57/SR.24, para. 12) and Algeria (A/C.6/57/SR.26, para. 39) in 2002, and Germany (A/C.6/58/SR.14, para. 61), Republic of Korea (A/C.6/58/SR.16, para. 81), Japan (ibid., para. 86) and Portugal (A/C.6/58/SR.18, para. 2) in 2003.

[61] See the statements in the Sixth Committee in the debate preceding the adoption of the request for an advisory opinion: 1948-1949 *Yearbook of the United Nations*, pp. 936-938; *Official Records of the General Assembly, Third Session*, Sixth Committee, Part 1, Legal Questions, Summary Records of Meetings, 112th mtg. (9 November 1948)-121st mtg. (25 November 1948), pp. 518-610.

on "how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"[62]

23. In responding to this question the Court acknowledged at the outset that injury to an agent of the United Nations (who was not a national of the defendant State) might give rise to "competition between the State's right of diplomatic protection and the Organization's right of functional protection".[63] The Court continued:

> "In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and as between the Organization and its Members it draws attention to their duty to render 'every assistance' provided by Article 2, paragraph 5, of the Charter.
>
> "Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.
>
> "The risk of competition between the Organization and the national State can be reduced or eliminated either by a general convention or by agreements entered into in each particular case. There is no doubt that in due course a practice will be developed, and it is worthy of note that already certain States whose nationals have been injured in the performance of missions undertaken for the Organization have shown a reasonable and cooperative disposition to find a practical solution."[64]

The Court then turned to the problem that might arise when the agent was a national of the defendant State. Here the Court stated:

> "The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national, does not constitute a precedent which is relevant here. The action of the Organization is in fact based not upon the nationality of the victim, but upon his status as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.
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> "In law, therefore, it does not seem that the fact of the possession of the nationality of the defendant State by the agent constitutes any obstacle to a claim brought by the Organization for a breach of obligations towards it occurring in relation to the performance of his mission by that agent."[65]

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[62] Supra note 40, at p. 175.
[63] Ibid., p. 185.
[64] Ibid., pp. 185-186.
[65] Ibid., p. 186.

The Court concluded:

> "When the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself; respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess, and thus bring about a reconciliation between their claims; moreover, this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States, either generally or in each case."[66]

24. The failure of the Court to give clear guidelines on how competing claims of functional protection and diplomatic protection might be reconciled troubled dissenting judges[67] and speakers in the Sixth Committee debate on the opinion.[68] However, no clear proposals were made for achieving such a reconciliation apart from negotiation between interested parties and the possibility of a general convention on the subject.[69] That ad hoc negotiation was seen to offer the best solution to the problem was confirmed by both the report of the Secretary-General on the advisory opinion[70] and the subsequent General Assembly resolution on the opinion, which authorized "the Secretary-General to take the steps and to negotiate in each particular case the agreements necessary to reconcile action by the United Nations with such rights as may be possessed by the State of which the victim is a national".[71] It is interesting to recall that Soviet-bloc speakers in the Sixth

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[66] Ibid., p. 188.

[67] See the opinions of Judge Azevedo, ibid., pp. 193-195, and Krylov, ibid., pp. 217-218.

[68] See *Official Records of the General Assembly, Fourth Session*, Sixth Committee, Legal Questions. Summary records of meetings: 183rd mtg. (3 November 1949)-187th mtg. (9 November 1949).

[69] Ibid., Mr. Maktos (United States of America), 183rd mtg., p. 277; Mrs. Bastid (France), ibid., p. 277; Mr. Fitzmaurice (United Kingdom), 184th mtg., p. 280; Mr. Mattar (Lebanon), ibid., pp. 284-285.

[70] "Reparation for injuries incurred in the service of the United Nations: advisory opinion of the International Court of Justice, and report of the Secretary-General" (A/955; A/960), *Official Records of the General Assembly, Fourth Session*, Sixth Committee, Annexes; agenda item 51. Paragraph 21 of the report states:

> "Subject to the General Assembly's approval, the Secretary-General proposes to adopt the following procedure: determine which of the cases appear likely to involve the responsibility of a State; consult with the Government of the State of which the victim was a national in order to determine whether that Government has any objection to the presentation of a claim or desires to join in a submission; present, in each such case, an appropriate request to the State involved for the initiation of negotiations to determine the facts, and the amount of reparations, if any, involved. In the event of differences of opinion between the Secretary-General and the State concerned which cannot be settled by negotiation, it would be proposed that the differences be submitted to arbitration. The arbitral tribunal would be composed of one arbitrator appointed by the Secretary-General, one appointed by the State involved, and a third to be appointed by mutual agreement of the two arbitrators, or, failing such agreement, by the President of the International Court of Justice."

[71] Resolution 365 (IV), para. 2.

Committee strongly rejected the Court's opinion on the ground that it undermined the sovereign right of a State to protect its nationals.[72]

25. Essentially, there are four issues concerning the relationship between functional protection and diplomatic protection that warrant consideration and that were before the International Court in the *Reparation for Injuries* advisory opinion:

(a) The possibility of multiple claims;

(b) The right of the United Nations to bring a claim on behalf of an agent against the State of nationality of the agent;

(c) The question whether it is possible to distinguish clearly between functional protection and diplomatic protection;

(d) The priority of claims.

26. Multiple claims do not present a serious problem. As the Court observed in *Reparation for Injuries*,[73] this is not a new phenomenon, but one that international tribunals have had experience in dealing with in the context of competing claims for diplomatic protection involving dual nationals. The important principle to apply here is that there should be no duplication of payments of damages by the defendant State — a principle endorsed by both the Court[74] and by the Secretary-General in his report on the implemeniation of the advisory opinion.[75] The draft articles on claims in respect of multiple nationals[76] make no mention of this obvious principle. There seems to be no good reason, therefore, why it should be included in a provision on competing claims between functional and diplomatic protection.

27. The Court's decision in *Reparation for Injuries*[77] in favour of the right of an international organization to bring a claim on behalf of an agent against his State of nationality was seen as a departure from general principle[78] largely because at that time, as acknowledged by the Court, it was not an accepted rule of customary international law that one State of nationality might bring a claim on behalf of a dual national against another State of nationality. Now that it is accepted that such a claim may be brought where the nationality of the claimant State is predominant,[79] this aspect of the Court's opinion is in line with the principles of diplomatic protection. There is no need to make special mention of this matter in a draft article for two reasons: first, because the principle accords with article 6 of the present draft articles; secondly, because any attempt to expound a principle of predominance of connection with an international organization would involve an examination of

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[72] Supra note 68: Mr. Koretsky (USSR), 183rd mtg., p. 278; Mr. Krajewski (Poland), 184th mtg., pp. 279-280; Mr. Gottlieb (Czechoslovakia), ibid., p. 286; M. V. Mitrofanov, *Officials of International Organizations* (Moscow, 1981), p. 48.

[73] Supra note 40, at p. 185, quoted in para. 23 above. V. N. Kudriavtzev (ed.), *International Law* (Moscow, 1990), vol. 3, p. 79.

[74] Ibid.

[75] Supra note 70, para. 23.

[76] Articles 5 and 7.

[77] Supra note 65.

[78] See the comment by Judge Krylov in *Reparation for Injuries*, supra note 40, at p. 218. U. R. Boyars, *Citizenship in International and National Law* (Riga, Stuchka State University of Latvia, 1981), p. 68.

[79] See article 6 in the present set of draft articles, supra note 3, para. 280. A. N. Verechetin (ed.), *International Law* (Moscow, 1967), vol. 3, p. 75.

the employment practices and appointment of agents by the organization in question — a matter that does not belong in the present study.

28. Probably the most effective way of reconciling claims of functional protection and those of diplomatic protection would be to draw up guidelines that clearly identify the type of agents to which functional protection may apply and to further identify the parameters of the functions that qualify for such protection. Having determined who qualifies as an agent and which actions qualify as official functions for the purposes of functional protection, it would then be possible to confine functional protection within clearly demarcated boundaries. Persons and actions falling within these boundaries would qualify for functional protection only while those falling outside would qualify for diplomatic protection. In this way competition between the two regimes would be eliminated — completely reconciled. In practice, however, it is not so easy to draw a clear distinction between the two regimes along these lines.

29. The decision of the International Court in *Reparation for Injuries* does not give clear guidelines on this subject. On the question of who is an agent, the Court states that it

> "understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions — in short, any person through whom it acts".[80]

On the question of the type of functions that attract protection, it must be recalled that in *Reparation for Injuries* the Court was concerned with an injury incurred directly in the course of the agent's duties. This was emphasized by Dr. Kerno, arguing on behalf of the United Nations, who stressed that the United Nations did not seek a general right of claims-espousal on behalf of its officials but only a limited right in respect of injuries incurred during service.[81] The Court accordingly approached the question before it on the presupposition

> "that the injury for which the reparation is demanded arises from a breach of an obligation designed to help an agent of the Organization *in the performance of his duties*. It is not a case in which the wrongful act or omission would merely constitute a breach of the general obligations of a State concerning the position of aliens; claims made under this head would be within the competence of the national State and not, as a general rule, within that of the Organization."[82]

That the Court had only the official duties of the agent in mind was further clear from its statement that:

> "the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed."[83]

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[80] Supra note 40, at p. 177.
[81] *I. C. J. Pleadings*, 1949, p. 65.
[82] Supra note 40, p. 182. Emphasis added.
[83] Ibid., p. 183.

While the Court's opinion may be interpreted as authority for the proposition that the United Nations has the right of protection where a staff member is injured while performing his official duties, but not where the injury occurs in the course of some private activity,[84] it fails to consider the outer limits of official duties.

30. That the term "agent" is open to different interpretations was emphasized by Judge Azevedo in his separate opinion in *Reparation for Injuries*. In his view "agent" included officials or experts appointed directly by the Organization, regardless of nationality, but not representatives of Member States, or experts appointed having regard to their nationality.[85] According to this interpretation, would "agent" include a special rapporteur appointed directly by the United Nations, regardless of nationality, but not members of the International Law Commission elected by the General Assembly in elections in which geographical distribution is a relevant factor? This question illustrates the uncertainty attached to the term "agent".

31. The limits to be placed on acts falling within the performance of official duties is even more controversial. Clearly there is a core of certainty, but there are many unresolved problems of the penumbra, to use the language of Lon Fuller.[86] May the United Nations exercise functional protection where an agent's landlord, angered by failure to pay rent, bursts into his United Nations office and shoots him? Would it be different if the landlord killed him at home? Does functional protection extend to an injury to a United Nations official on paid vacation? Does it extend to a United Nations official on a special mission who is killed in a restaurant by terrorists not opposed to the United Nations but to the Government of the host State? Examples of this kind are legion. Hardy, after considering examples of this kind, and recalling the Court's comment that "when the United Nations as an Organization is bringing a claim for reparation of damages caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself",[87] submits that:

> "Although therefore, the Opinion was only strictly concerned with claims in respect of injuries incurred during the performance of duty, it is suggested that it is in fact authority for the pursuit of claims on a less restricted basis, namely as a result of breaches of obligations due to the Organization itself, the objects of which are to safeguard the agent in the interests of the Organization."[88]

32. In the light of the uncertainties pertaining to the meaning of the term "agent" and of the scope of official duties, it seems unwise to draft a provision to the effect that functional protection may be exercised by an international organization in respect of injury to an agent incurred in the course of performing official duties and that all other injuries to such a person are to be the subject of diplomatic

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[84] F. Seyersted, "United Nations Forces: Some Legal Problems" (1961) 37 *BYIL* 357, at p. 424; Amerasinghe, *Principles of the Institutional Law* ..., supra note 53, p. 440. This interpretation of *Reparation for Injuries* was followed by the ILO Administrative Tribunal in *Jurado v. ILO*, supra note 45. See also A. Remiro Brotóns et al., *Derecho Internacional* (1997), pp. 514-515.

[85] Supra note 40, at p. 195; see also Judge Krylov, ibid., p. 218. Cf. Hardy, supra note 49, pp. 522-523, who suggests that there should be a "genuine link" between organization and agent. A similar suggestion was made by the representative of Portugal in the debate in the Sixth Committee in 2003 (A/C.6/58/SR.18, para. 2).

[86] "Positivism and Fidelity to Law" (1958) 71 *Harvard Law Review* 630.

[87] Quoted at footnote 66 above.

[88] Supra note 45, p. 520.

protection.[89] Not only would such a provision be flawed for reasons of uncertainty, it would also trespass on the field of functional protection which, it is generally agreed, belongs to another study.

33. The suggestion that the criterion to be employed in determining whether an international organization or the State of nationality should exercise protection is that of preponderance — whether the internationally wrongful act was preponderantly directed against the international organization or the State of nationality of the injured agent — is flawed for reasons similar to those advanced above. In penumbral situations of the kind described in paragraph 31, where it is unclear whether the agent is engaged in official duties at the time of the injury, it will not be possible to determine whether he was injured because he was an official of the international organization or because he was a national of a particular State. Indeed, in many such cases, he will be targeted for reasons unrelated to either his employment or his nationality.

34. A more helpful method of reconciling competing claims might be to give priority to functional protection where it conflicts with diplomatic protection. The foremost proponent of this view is Clyde Eagleton who, in his Hague Lectures of 1950,[90] advanced the following reasons for according priority to a claim by the United Nations:

(1) It is important for the United Nations to be able to protect its agents. It is only because of the United Nations that the agent has been put at risk of harm, and as a result the United Nations should assume responsibility for the agent's protection. It is important for the Organization to be able to demonstrate to potential employees its willingness to offer protection, and this protection cannot be left to the State of nationality, which may not always be willing or able to provide competent protection.

(2) The State of nationality will often not be interested in pressing a claim and may "feel much happier if it were relieved of the burden" of doing so, given the expense involved, the State's probable unfamiliarity with the circumstances of the case, and the possibility of souring its relations with the respondent State.

(3) The defendant State, particularly if a small State, will usually prefer to deal with the United Nations, rather than another (especially a more powerful or an aggressive) State.

(4) The individual agent will invariably prefer to have his or her claim made by the United Nations rather than his or her State of nationality. It will often be unclear whether the State of nationality will exercise diplomatic protection at all and, even if it does, how strongly it will advocate for the case of the individual, given political considerations. Moreover, smaller States in particular are unable to wield the same political power or achieve the same levels of publicity and sympathy as the United Nations.

[89] A proposal to this effect was made by the Republic of Korea in the Sixth Committee in 2003 (A/C.6/58/SR.16, para. 81).

[90] "International Organization and the Law of Responsibility" (1950 I) 76 *Recueil des Cours* 319, at pp 361-363.

(5) In the light of Article 100 of the Charter of the United Nations, which requires that United Nations staff act out of loyalty to the Organization and shun instructions from their State of nationality, the agent has a closer and more pertinent link to the United Nations than to his or her national State.

(6) International law requires a higher degree of diligence in protecting an official than for protecting a private individual.[91] For this reason the injured individual would prefer to have the United Nations, rather than its own State, press the claim.

(7) The United Nations "constitutes a whole more important than any of its parts". Accordingly, by analogy with Article 103 of the Charter, the interests of the United Nations should prevail over those of a Member State in the case of conflict.

35. There is certainly substance in the arguments raised by Eagleton for a prior claim in favour of the United Nations. Whether these arguments apply with equal force to other international organizations is not so clear, as several of these arguments are founded in the Charter of the United Nations as a higher law. Moreover, there is no support for the principle of priority in the practice of the United Nations. Despite this, the principle of priority for a claim of protection of an agent by an international organization is included in the bracketed part of article 25. The effect of this bracketed phrase is to give an international organization the opportunity to first assert its claim of functional protection against the wrongdoing State. The organization may be unable to do so for several reasons. For instance, the "agent" may not qualify for protection; the injurious act may have occurred outside the performance of duties; or the constitution of the organization may not recognize functional protection in general or in the particular circumstances of the case. In such a case, the residual right of the State of nationality of the agent will become effective if the national State decides to grant diplomatic protection. This residual right will also arise where, on the facts of the particular case, the organization decides, in the exercise of its discretion, not to provide protection. (Though it is uncertain whether this will be possible in the light of the authority for the view that there is a duty on the part of an organization to extend functional protection to an agent for injury suffered in the course of his official duties.)[92]

36. The Commission may prefer to adopt a provision that merely acknowledges the right of a State to exercise diplomatic protection where functional protection is also a possibility, by excluding the bracketed phrase in favour of the priority of functional protection. This would accord with the approach of the International Court of Justice in *Reparation for Injuries*,[93] and the report of the Secretary-General following the rendering of that opinion,[94] that "there is no rule of law which assigns priority to the one [claim] or the other" and leaves it to the "goodwill and common sense" of the parties concerned to reconcile competing claims by negotiation and

[91] See further on this matter, Hardy, supra note 45, p. 517.

[92] See the authorities cited in footnote 52 above.

[93] Supra notes 63, 66.

[94] Supra note 70. See also Remiro Brotóns, supra note 84, p. 515.

agreement. That there is merit in this pragmatic approach[95] is confirmed by the fact that, in practice, competing claims have been reconciled by negotiations[96] and, as far as the Special Rapporteur is aware, there is no recorded case in which a potential conflict between an international organization and State of nationality has materialized. On the other hand, it may be contended that without the principle of priority the provision adds little to existing law, restates the obvious and may therefore be omitted altogether.

D. Human rights, diplomatic protection and a general saving clause

1. Article 26

These articles are without prejudice to the right that a State other than a State entitled to exercise diplomatic protection or an individual may have as a result of an internationally wrongful act.

37. The first report on diplomatic protection submitted by the present Special Rapporteur in 2000 stressed that the customary international law rules on diplomatic protection that have evolved over several centuries, and the more recent principles governing the protection of human rights, complement each other and, ultimately, serve a common goal — the protection of human rights.[97] The present articles should therefore make it clear that they are not intended to exclude or to trump the rights of States other than the State of nationality of an injured individual to protect that individual under either customary international law or a multilateral or bilateral human rights treaty.

38. A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights,[98] the International Convention on the Elimination of All Forms of Racial Discrimination,[99] the Convention against Torture

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[95] During the 2003 debate of the Sixth Committee on the report of the International Law Commission, the representative of Germany made a pragmatic suggestion that incorporates the priority principle:

> "Regarding the conflict of competing rights to diplomatic protection between the State of nationality of the agent and the organization, a pragmatic approach should be adopted. As diplomatic protection deals with the right of a State or an international organization, Germany holds that the decisive criteria should be whether the internationally wrongful act is predominantly directed against the organization or the State of nationality of the acting agent. However, the less affected international person, be it the organization or the State, should be entitled to exercise the right of diplomatic protection if the most affected one is not capable or willing to exercise diplomatic protection." (summarized in A/C.6/58/SR.14, para. 61).

[96] See the report of negotiations entered into by the Secretary-General with France, Norway, Sweden and the United States of America before taking action in respect of the various deaths and injuries incurred in the Middle East in 1948: Secretary-General's report on reparation for injuries incurred in the service of the United Nations: A/1851 (1951), A/2180 (1952).

[97] A/CN.4/506, particularly paras. 22-32. In para. 32, the Special Rapporteur stated that "diplomatic protection remains an important weapon in the arsenal of human rights protection".

[98] Article 41.

[99] Article 11.

and Other Cruel, Inhuman and Degrading Treatment or Punishment,[100] the European Convention on Human Rights,[101] the American Convention on Human Rights[102] and the African Charter on Human and Peoples' Rights.[103] Similarly, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The decision of the International Court of Justice in the 1966 *South West Africa*[104] cases holding that a State might not bring legal proceedings to protect the rights of non-nationals is today seen as bad law and was expressly repudiated by the Commission in its articles on State responsibility.[105] Moreover, article 48 of those articles permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole.

39. The individual is also endowed with rights and remedies to protect itself against the injuring State, whether the individual's State of nationality or another State, in terms of international human rights conventions. A saving clause was inserted in the articles on State Responsibility — article 33 — to take account of this development in international law.

40. In these circumstances it might be wise to include a saving clause in the present draft articles along the lines of article 26.

2. Alternative formulation for article 21

These articles are without prejudice to the rights of States or persons to invoke procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act [that might also give rise to a claim for diplomatic protection by the State of nationality of the injured person].

41. In the debates in both the Commission[106] and the Sixth Committee on the proposal that a *lex specialis* clause be included in the present draft articles to exclude their application where the protection of corporations or their shareholders is governed by special rules of international law,[107] it was suggested that it might be preferable to include an omnibus "without prejudice clause" covering both bilateral investment treaties and human rights treaties. This would make it clear that the present draft articles are without prejudice to the existence and operation of other legal regimes governing the protection of persons, both natural and legal, or their property. The decision of the Commission to refer proposed article 21 on the subject of *lex specialis* to the Drafting Committee with a view to having it reformulated and located at the end of the draft articles, possibly, as a "without prejudice clause",[108] was probably intended to achieve this goal. Whether it is desirable to include a general saving clause that embraces two such different alternative legal regimes to

[100] Article 21.
[101] Article 24.
[102] Article 45.
[103] Articles 47-54.
[104] *Second Phase*, 1966 *I. C. J. Reports*, p. 6.
[105] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), commentary to article 48, footnote 766.
[106] Supra note 6, paras. 124-139.
[107] Article 21 of the proposed present draft articles, supra note 6, footnote 76.
[108] Supra note 6, para. 139.

diplomatic protection as bilateral investment treaties and human rights treaties is questionable. However, such a clause might read as proposed above.

42. Such an omnibus saving clause would ensure that States, corporations and shareholders are entitled to invoke rights and remedies contained in bilateral investment treaties for the protection of foreign investment, without excluding their right to rely on principles of customary international law in the field of diplomatic protection that might support or complement their claim. At the same time it would allow both the State of nationality of an injured person and other States, as well as the injured person, to pursue remedies prescribed in international human rights conventions, again without exclusion of the right to use such principles of diplomatic protection that might assist the claimant. The phrase in square brackets is probably superfluous. It does, however, emphasize that procedures of the kind covered in this saving clause are complementary to diplomatic protection.

43. Diplomatic protection, bilateral investment treaties and human rights treaties are all mechanisms designed to protect persons who have suffered injury as a result of an internationally wrongful act. They are meant to complement and support each other in the pursuit of this goal. The present articles should make it clear that these regimes are not in competition or exclusive of each other. The proposed article, as reformulated, seeks to achieve this end.

E. Diplomatic protection of ships' crews by the flag State

1. Article 27

The State of nationality of a ship is entitled to exercise diplomatic protection in respect of the crew of the ship, irrespective of whether they are nationals of the State of nationality of the ship, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

44. There is some support in the practice of States, as reflected in judicial decisions and in the writings of publicists, for the position that the State of nationality of a ship (the flag State) may protect members of the crew of the ship who do not have its nationality. There are also sound policy considerations in favour of such an approach.

45. State practice emanates mainly from the United States. Under American law foreign seamen have traditionally been entitled to the protection of the United States while serving on American vessels.[109] For protection purposes, the term "American seaman" included foreigners who regularly shipped on American vessels in a United States port or in a foreign port if they declared their intent to become American citizens.[110] Once a foreign sailor thus acquired the character of an American seaman, he was able to reship in foreign ports without losing his rights and

[109] Borchard, supra note 28, p. 475; O'Connell, supra note 30, p. 1050.

[110] Borchard, op. cit., p. 475. An Act of 1870 provided: "Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court ... hall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen." (2174) of the Revised Statutes of the United States; repealed and re-enacted in 1918 (40 Stat. 542); repealed in 1935 (49 Stat. 376).

privileges under the laws of the United States.[111] The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State.[112] In *Ross v. McIntyre*, the United States Supreme Court applied this principle, holding that it had jurisdiction over a British subject serving on an American ship because:

> "By ... enlistment he became an American seaman, one of an American crew on board of an American vessel, and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities."[113]

The Court noted that although he was a British citizen, while serving on an American vessel he owed temporary allegiance to the United States and consequently could not expect protection from the British Government. He could, however, "insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born".[114] This unique status of foreigners serving on American vessels was consistently reaffirmed in diplomatic communications and consular regulations of the United States.[115] For instance, despite the Chinese exclusion acts, Chinese seamen were entitled to the same protection rights as American sailors so long as they served on American vessels.[116] In representations to the Chinese Government regarding injuries sustained by members of the crew of an American vessel, the American Government stated that as seamen the crew members were entitled to the Government's protection irrespective of nationality.[117] The bombing of the American vessel *President Hoover* in the vicinity of Shanghai in 1937 caused the Department of State to instruct the United States embassy at Nanking that "irrespective of nationality of surviving members of crew, they are, as American seamen on an American vessel, regarded as entitled to this Government's assistance".[118] This practice was confirmed by the Department of State's General Instructions for Claimants, which provided that:

> "The Government of the United States can interpose effectively through diplomatic channels only on behalf of itself, or of claimants (1) who have American nationality ... or (2) who are otherwise entitled to American protection in certain cases (such as *certain classes of seamen on American vessels*, members of the military or naval forces of the United States, etc.). Unless, therefore, the claimant can bring himself within one of these classes of claimants, the Government cannot undertake to present his claim to a foreign Government."[119]

46. That the practice of the United States provides evidence of a customary rule in favour of the protection of seamen by the flag State is open to question. In a seminal

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[111] Hackworth, supra note 38, vol. 4, p. 883.

[112] *Ross v. McIntyre*, 140 U.S. 453 (1891).

[113] Ibid., p. 472. See also D. Moore, *International Law Digest* (1906), vol. 3, p. 797.

[114] Loc. cit.

[115] Consular Regulations, 1888, ss. 171, 172; Foreign Service Regulations, June 1941 (Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (1945), vol. 2, p. 1180.).

[116] Moore, supra note 113, p. 798.

[117] Hackworth, supra note 111, p. 884.

[118] Ibid., vol. 3, p. 418.

[119] *UNRIAA*, vol. 7, p. 177. Emphasis added.

article on this subject written in 1958,[120] Arthur Watts contended that American practice was based on resistance to British claims during the Napoleonic wars of a right to stop foreign private vessels on the high seas and search them for deserters and those liable for military service in Britain. Consequently it "would appear to have originated in circumstances which make suspect its application in connection with nationality of claims".[121] In a communication dated 20 May 2003[122] addressed to the International Law Commission, the United States Department of State associated itself with Watts' view, maintaining that its practice of providing diplomatic protection to crew members who hold the nationality of a third State "stemmed from United States opposition to British impressment of seamen on United States-flag merchant vessels sailing on the high seas, especially during the Napoleonic Wars". This historical explanation for the origin of United States practice, together with the failure of the United States to adhere consistently to this practice — as evidenced by the contrary position taken in the *"I'm Alone"* case,[123] has led the United States Department of State to cast doubts upon the certainty of a customary rule allowing the State of nationality of a ship to protect third State crew members and to propose that the issue should be omitted from the present draft articles.

47. Although the United Kingdom has no basis in municipal law for making claims on behalf of alien seamen,[124] there is some support for the right to make such a claim in practice and case law. In 1804, Sir W. Scott gave an opinion in which he appeared to assume that a foreign seafaring man who acquired a domicile in the United Kingdom thereby "assumes the character of a British Mariner" and became entitled to "all the advantages of British Protection and Navigation".[125] Moreover, in *R v. Carr* (1882), the Queen's Bench Division declared, in language similar to that of the United States Supreme Court in *Ross v. McIntyre*, that:

> "The true principle is that a person who comes on board a British ship, where English law is reigning, places himself under the protection of the British flag and as a correlative, if he becomes entitled to our law's protection, he becomes amenable to its jurisdiction, and liable to the punishment it inflicts upon those who there infringe its requirements."[126]

48. International arbitral awards are inconclusive on the right of a State to extend diplomatic protection to non-national seamen, but tend to lean in favour of such right rather than against it. In *McCready (US) v. Mexico* the umpire, Sir Edward Thornton, held that "seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the

[120] "The Protection of Alien Seamen" (1958) 7 International and Comparative Law Quarterly 691, at p. 708.

[121] Loc. cit.

[122] This communication is on file with the Codification Division of the Office of Legal Affairs of the United Nations.

[123] Discussed in para. 49 below.

[124] See British reply to the questionnaire of the Preparatory Committee of the Hague Codification Conference, League of Nations, doc. C. 75, M. 69. 1929. V, p. 206.

[125] A. D. McNair, *International Law Opinions* (1956), vol. II, p. 172.

[126] L.R. 10 Q.E.D. 76 at p. 85 (1882). See also *R. v. Anderson*, L.R.: 1 C.C.R. 161 at pp. 165-167 (1868).

flag under which they serve".[127] (Both Schwarzenberger[128] and Watts[129] have suggested, however, that such a finding was unnecessary as there was evidence of the claimant's right to United States citizenship.) In *Richelieu (US) v. Spain*[130] the Spanish Treaty Claim Commission made an award in favour of Richelieu: "a native of France, who, in 1872, declared his intention to become a citizen of the United States, and subsequently served as seaman and steward on American merchant vessels for more than twenty-five years". (But, again, the value of this award is questioned by Watts, who contends that Richelieu had probably lost French nationality and de facto had become a United States national.[131]) In *Shields (US) v. Chile*[132] and *Hilson (US) v. Germany*,[133] United States claims to an entitlement to protect aliens serving on United States vessels were dismissed, but mainly because the *compromis* in both cases expressly limited claims to United States citizens.[134]

49. In the "*I'm Alone*" case,[135] which arose from the sinking of a Canadian vessel by a United States Coast Guard ship, the Canadian Government claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel.[136] Ironically the United States contested Canada's right to claim on behalf of non-nationals. The Commission, without examining the issue of nationality, awarded compensation in respect of all three non-Canadian seamen.

50. In the *Reparation for Injuries* advisory opinion[137] two judges, in their dissenting opinions, went out of their way to approve the right of a State to exercise diplomatic protection on behalf of alien crew members. Judge Hackworth declared that:

> "Nationality is a sine qua non to the espousal of a diplomatic claim on behalf of a private claimant. Aside from the special situation of protected persons under certain treaties and that of seamen and aliens serving in the armed forces, all of whom are assimilated to the status of nationals, it is well settled that the right to protect is confined to nationals of the protecting State."[138]

Judge Badawi Pasha interpreted the Court's statement in this opinion that there are important exceptions to the traditional nationality of claims rule[139] "to relate to the protection of the flag ..., in which case protection extends to everyone in the ship ..., independent of nationality".[140]

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[127] Moore, *International Arbitrations*, vol. 3, p. 2536.
[128] Supra note 15, pp. 593-594.
[129] Supra note 120, p. 710.
[130] Cited by Watts, supra note 120, p. 694.
[131] Ibid., p. 710.
[132] Moore, supra note 127, p. 2557.
[133] *UNRIAA*, vol. 7, p. 176. See, however, the opinion of the American Commissioner in this case, who argued strongly in favour of a right to protect alien crew members (p. 178).
[134] Schwarzenberger, supra note 15, p. 594.
[135] (1935) 29 *A.J.I.L.* 326.
[136] G. G. Fitzmaurice, "The Case of the I'm Alone" (1936) 17 *B. Y. I. L.* p. 82, at pp. 91-92.
[137] Supra note 40.
[138] Ibid., pp. 202-203.
[139] Ibid., p. 181.
[140] Ibid., pp. 206-207, footnote 1.

51. There is not a wealth of literature on this subject and, as might be expected in the light of the practice and authorities discussed above, it is divided in its support for such a right. For instance, while Watts[141] and Schwarzenberger[142] doubt whether such a right exists, Brownlie,[143] Dolzer[144] and Meyers[145] support the existence of such a customary rule. Indeed Meyers, writing in 1967, states that he "does not know of any cases in which an international tribunal or Court took the ground that the flag State was not permitted to protect an alien member of the crew".[146]

52. In 1999, the International Tribunal for the Law of the Sea handed down its decision in *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*[147] which provides support, albeit not unambiguous, for the right of the flag State to protect non-national crew members.

53. The dispute in this case arose out of the arrest and detention of the *Saiga* by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The *Saiga* was registered in St. Vincent and the Grenadines ("St. Vincent") and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In 1997 the Tribunal, acting pursuant to article 292 of the United Nations Convention on the Law of the Sea (UNCLOS) ordered the prompt release of the *Saiga* upon payment of a bond by St. Vincent. Despite the posting of the bond, neither the *Saiga* nor its crew were released. Moreover, Guinea instituted criminal proceedings against the master, which cited St. Vincent as civilly liable, and found him guilty. St. Vincent subsequently began arbitral proceedings against Guinea protesting the continued detention of the *Saiga* and the legality of the master's prosecution. Meanwhile, the court of appeals in Guinea found the master guilty of illegal importation of fuel into Guinea and imposed a substantial fine and a suspended sentence of six months' imprisonment. Furthermore, the court ordered confiscation of the cargo and seizure of the vessel in order to guarantee the payment of the fine. In 1998, the parties agreed to transfer the arbitral proceedings to the International Tribunal for the Law of the Sea. The master and the crew, along with the ship, were released on 28 February 1998. Despite the agreement to transfer the proceedings to the Tribunal, Guinea objected to the admissibility of St. Vincent's claim, inter alia, on the ground that the injured individuals were not nationals of St. Vincent and had not exhausted local remedies. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew; confiscating the cargo, and prosecuting and convicting the master; violating the provisions of UNCLOS on hot pursuit of vessels; and using excessive force during the arrest. Finally, it ordered Guinea to pay compensation in the sum of US$ 2,123,357 to St. Vincent for damages to the *Saiga* and for injury to the crew.

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[141] Supra note 120, p. 711.

[142] Supra note 15, p. 594.

[143] Supra note 30, p. 460.

[144] "Diplomatic Protection of Foreign Nationals", in *Encyclopedia of Public International Law* (1992), vol. 1, p. 1068. See also ibid., p. 1054.

[145] *The Nationality of Ships* (1967), pp. 90-108.

[146] Ibid., p. 104.

[147] (1999) 38 *I. L. M.* 1323.

54. Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent,[148] the Tribunal's reasoning suggests that it also saw the matter as a case of diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent.[149] St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag "irrespective of their nationality".[150] In dismissing Guinea's objection the Tribunal stated that UNCLOS in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State.[151] It stressed that "the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant".[152] Finally, it indicated the reasons of policy in favour of such an approach. It stated that modern maritime transport was characterized by "the transient and multinational composition of ships' crews" and warned that "ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue".[153]

55. The Tribunal's reasoning in support of its dismissal of the objection of failure to exhaust local remedies is not unequivocal on the issue of diplomatic protection. First, the Tribunal held that Guinea had directly violated the rights of St. Vincent under UNCLOS with the result that local remedies need not be exhausted.[154] Then, it held that "even if ... some of the claims made by Saint Vincent and the Grenadines in respect of natural or juridical persons did not arise from direct violations of the rights of Saint Vincent and the Grenadines",[155] there was no need to exhaust local remedies because there was "no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims".[156]

56. That the Tribunal treated the claims of St. Vincent as arising out of both *direct* injury to itself through injury to its ship and *indirect* injury stemming from unlawful treatment of the crew on board its ship is apparent from its decision on reparation, where it distinguished between "damage suffered directly" by St. Vincent and "damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation", which comprised, inter alia, "injury to persons, unlawful arrest, detention or other forms of ill-treatment".[157] This distinction was confirmed by its assessment of compensation, where the Tribunal awarded compensation for both injury to the *Saiga* itself and injury to the crew arising out of unlawful detention and personal injury.

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[148] Ibid., p. 1345, para. 98.
[149] Ibid., p. 1346, para. 103.
[150] Ibid., para. 104.
[151] Ibid., para.105.
[152] Ibid., para. 106.
[153] Ibid., para. 107.
[154] Ibid., p. 1345, para. 98.
[155] Ibid., para. 99.
[156] Ibid., p. 1346, para. 100. See further the separate opinions of Judges Wolfrum (ibid., pp. 1380-1382) and Warioba (ibid., p. 1434, para. 61).
[157] Ibid., p. 1357, para. 172.

57. The inclusion of a provision recognizing the right of the flag State to exercise diplomatic protection on behalf of non-national crew members has been debated in both the Commission in 2002 (in an informal consultation) and the Sixth Committee in 2002 and 2003 (in response to a request by the Commission for the expression of views on the subject). While the Commission was evenly divided on the subject, the majority of speakers in the Sixth Committee were opposed to its inclusion. In essence two reasons have been advanced against the inclusion of such a provision. First, the protection afforded by a rule of the kind contained in draft article 27 differs substantially from diplomatic protection in that it is not founded on nationality.[158] Secondly, protection of this kind is regulated by article 292 of UNCLOS. The first of these objections requires little discussion as it is readily conceded that we are not here concerned with traditional diplomatic protection. The question to be considered is whether this form of protection is sufficiently analogous to diplomatic protection to warrant inclusion in the same way that article 7 of the present draft articles provides for diplomatic protection of refugees and stateless persons. The second objection does, however, warrant closer attention.

58. It has been suggested in both the Commission and the Sixth Committee that the Law of the Sea Tribunal in *Saiga* based its decision on article 292 of the UNCLOS rather than the right of the flag State to exercise protection on behalf of the whole crew, irrespective of nationality. Article 292 reads:

> "1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
>
> "2. The application for release may be made only by or on behalf of the flag State of the vessel.
>
> "3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.
>
> "4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew."

59. Article 292 was included in response to the desire of delegations to include a safeguard procedural provision providing for the speedy release of crew and vessel.[159] It was initially proposed that the provision should protect not only the

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[158] See M. Kamto, "La nationalité des navires en droit international", in *Les Mélanges: liber amicorum, J. P. Queneudec et L. Lucchini* (2003), paras. 75-86.

[159] *University of Virginia Commentary on the UN Convention on the Law of the Sea* 1982, vol. V (eds. M.Y. Nordquist, S. Rosenne and L. B. Sohn), p. 67.

vessel, but detained members of the crew and passengers.[160] The informal working group on the settlement of disputes considered, but ultimately did not grant, the right to complain to the Law of the Sea Tribunal directly to the owner or operator of the vessel, or to the members of the crew or passengers of the vessel.[161] The proposal for allowing individuals to bring the claims before the Tribunal was motivated by the ponderous nature of governmental mechanisms for dispute resolutions.[162] This proposal, however, was rejected and the right to bring claims before the Tribunal was restricted to the State of the ship's registry.[163] Moreover, the commentary to the article makes it clear that the right to complain is restricted to cases provided for in the substantive parts of the Convention and does not apply to all cases of detention, such as those in territorial waters.

60. Article 292 was thus not intended to cover the protection of crews in all cases. The article is largely a procedural mechanism designed to ensure the prompt release of the vessel for economic purposes. It may, however, be used as a mechanism to secure the prompt release of the crew as well as the vessel. This is illustrated by both the *Saiga* case and the *Grand Prince* case (Belize v. France).[164]

61. Article 292 is a useful mechanism for the release of the crew *in conjunction* with a request for the release of the vessel. However, it is not a substitute for the diplomatic protection of crews because there are numerous cases in which article 292 will not ensure their protection. Moreover, while the article may ensure the release of crews it does nothing to ensure an internationally accepted standard of treatment while they are in custody. There are suggestions that the crew of the *Saiga* were maltreated while in detention.[165] It is not clear why this was not raised in the proceedings but it is likely that this happened because the case was presented as a violation of the rights of the ship rather than a case about any violation of the human rights of crew members. There is, of course, nothing in article 292 which provides for the protection of human rights of the crew while in detention. In summary, article 292 does not cover all, or probably even most, cases in which ships crews will be injured by an internationally wrongful act. There is therefore a need for a mechanism wider in scope than article 292 for the protection of ships crews. Article 27 seeks to establish such a mechanism.

62. There are cogent policy reasons for allowing the flag State to exercise diplomatic protection in respect of a ship's crew. This was recognized by the Law of the Sea Tribunal in *Saiga* when it called attention to "the transient and multinational composition of ships' crews" and stated that large ships "could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue".[166]

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[160] Ibid., p. 67

[161] Ibid.

[162] Ibid., p. 68.

[163] Ibid., p. 69

[164] The *Grand Prince* case (Belize v. France) (20 April 2001). Prompt Release. Judgment. Available at www.itlos.org/start2_en.html. M. I. Lazarev (ed.) *Contemporary International Law of the Sea* (Moscow, 1984), p. 211.

[165] See the *Saiga* case, supra note 147, p. 135°, para. 175.

[166] Supra note 147, para. 107.

63. Many of today's ships' crews come from politically and economically weak States with undistinguished human rights records and little interest in the protection of their nationals who have lost close contact with their own States while employed on foreign ships and have suffered injuries in the service of foreign ships. It is true that sometimes the flag State will be a State that provides flags of convenience with little interest in the crews of the vessels which fly its flag. On the other hand, such flag States need to protect their reputation as providers of flags of convenience, and this may act as an incentive to protect foreign crew members. Certainly there will be more incentive to protect crew members in the case of such States than there will generally be for the State of nationality of crew members.

64. Crew members are closely linked with the flag State. They are subject to the criminal jurisdiction of the flag State and, in the words of the European Court of Justice, "it must be emphasized that the law governing the crew's activities does not depend on the nationality of the crew members, but on the State in which the vessel is registered".[167] Moreover, the flag State is obliged to afford proper labour conditions to all crew members[168] and to give them seafarer's identity documents enabling them to go onshore in ports of call.[169] In these circumstances it would seem appropriate for the flag State to be entitled to protect them when they are injured in the course of an injury resulting from an internationally wrongful act.

65. Practical considerations relating to the bringing of claims should not be overlooked. It is much easier and more efficient for one State to exercise protection on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals. The multiplicity of claims was disapproved of by the International Court of Justice in the *Barcelona Traction* case[170] in respect of shareholders' claims. Similar considerations apply to ships' crews.

66. Allowing the flag State to exercise protection may result in the bringing of claims by both the flag State and the State of nationality of the members of a ship's crew. This remote possibility is not a problem as it resembles the protection of dual nationals covered by article 5 of the present draft articles.

67. The extension of diplomatic protection to ships' crews may give rise to claims for similar protection to ships' passengers, to crews and passengers on board aircraft and to the crews of spacecraft. It is submitted that neither policy considerations nor State practice support such an extension. Claims of this kind will, however, be briefly considered.

Passengers on board a ship

68. Although there is some support for the view that passengers on board a ship are entitled to the same protection as the crew,[171] it is submitted that there are

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[167] *Anklagemyndigheden (Public Prosecutor) v. Peter Poulsen*, judgement of 24 November 1992, Case C 286/90.

[168] UNCLOS, article 94 (3) (b); ILO Merchant Shipping Minimum Standards Convention of 1976, C.147.

[169] ILO Seafarers' Identity Documents Convention of 1958, C. 108.

[170] 1970 *I. C. J. Reports* 3, at pp. 40-48. See also, the dictum in the *Saiga* case, supra note 166.

[171] In *R v. Carr* 10 *Q. B. D.* 76, at p. 85 (1882), Lord Coleridge stated, having found that an individual on board a British ship was amenable to British jurisdiction and protection regardless of his status, it followed that "I can draw no distinction between those who form part of the

important differences between crew and passengers which preclude such a conclusion. The rationale for extending protection to seamen rests to a substantial degree on the notion that by enlisting in the service of a merchant vessel the seaman temporarily subjects himself to the jurisdiction, laws and allegiance of the flag State. He thus acquires the character of a national and the corresponding right to the flag State's protection.[172] These protection rights are conferred solely because of the unique status of seamen and are strictly limited.[173] The same cannot be said of passengers, who have a more limited and transient connection with the ship. They must seek protection from their State of nationality. This is confirmed by the absence of State practice on the subject of protection of passengers by the flag State.

Aircraft crews and passengers

69. The analogy between a ship's crew and an aircraft's crew might suggest that the latter should likewise be protected by the State of registration of an aircraft. Support for such a position may be found in the Tokyo Convention of 1963, which gives the State of registration the competence to exercise jurisdiction over acts committed on board the aircraft.[174] There is, however, a difference between jurisdictional competence and the right of diplomatic protection, and it is difficult to argue that such protection should be extended to aircraft crew in the absence of State practice. Furthermore, policy considerations do not support the extension of protection to aircraft crews. They are not isolated from their own State of nationality for many months or years, as are ships' crews. Moreover, they enjoy a status in society that renders it more likely that their State of nationality will, if necessary, protect them.

70. A fortiori, if the crew cannot be protected, passengers on board an aircraft should enjoy no protection. Support for this position is to be found in the Cathay Pacific incident of 1954,[175] in which the United States claimed compensation from China for the deaths of United States nationals who were passengers on board a British aircraft shot down by a Chinese military aircraft. The United States rejected the Chinese assertion that this was a matter to be settled by the United Kingdom and China through diplomatic channels.

71. Two recent calamities involving aircraft and their passengers may be thought to have some bearing on this subject. In both the Pan-Am (*Lockerbie*) and the UTA (Niger) cases claims were brought against the Libyan Arab Jamahiriya by victims' associations on behalf of the families of all those killed, irrespective of their nationality.[176] Although these claims were backed by the United States and France

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crew, those who come to work in or on the ship, those who are present involuntarily, or those who come voluntarily as passengers".

[172] See generally, *Ross v. McIntyre*, 140 US 453 (1891); *Edward A. Hilson (U.S.) v. Germany*, 7 *UNRIAA* 176 (1925).

[173] The right of protection does not, for instance, extend to the seaman's wife or immediate family: Moore, supra note 113, p. 800.

[174] Convention on Offences and Certain Other Acts Committed on Board Aircraft, United Nations, *Treaty Series*, vol. 704, p. 218, article 3.

[175] M. M. Whiteman (1965) 4 *Digest of International Law*, pp. 534-535.

[176] In the case of the *Lockerbie* it appears that most of the victims on board the Pan-Am flight 103 in 1988 were of United States nationality. There were, however, 17 different nationalities involved in the shooting down of the UTA flight over Niger in 1989. See BBC News/Africa of 9 January 2004; (2000) 97 *AJIL* 987.

respectively, it is difficult to categorize them as examples of diplomatic protection. They are best seen as private claims brought by claimant associations supported by the State of nationality of the aircraft and the majority of the passengers and crew.

Spacecraft

72. Spacecraft resemble ships in terms of the multinational character of their crew and the length of time that the crew may be compelled to remain on board the spacecraft. Not surprisingly, there is no State practice in favour of protection of crew by the State of registration of the spacecraft. It would, however, be unwise at this stage to engage in progressive development of the law on this subject.

Conclusion

73. Article 27 serves to extend the principles of traditional diplomatic protection incrementally. It may be described as an exercise in codification rather than progressive development, as there is sufficient State practice to justify such a rule. It is not a bold provision, as it is limited to injuries to a foreign national sustained in the course of an injury to a ship and would not extend to injuries sustained by the foreign national on shore leave. It is moreover supported by sound policy considerations. It is therefore proposed that it should be adopted by the Commission. If, however, the Commission decides not to approve such a provision, it should adopt the following saving clause:

> **These draft articles are without prejudice to the exercise of protection by the State of nationality of a ship [or aircraft] of the crew of such a ship [or aircraft], irrespective of whether the persons are its nationals.**

Such a saving clause would at least ensure that the evolution of a customary rule on the protection of a ship's crew by the flag State is not prejudiced by the exclusion of such a rule from the present draft articles.